

exchange for his lies against Kay, the Bureau apparently is willing to allow Barnett to retain and even potentially profit from the sale of the defunct and fallow license.

D. Christopher C. Killian

44. Christopher C. Killian ("Killian") is yet another Sobel/Kay competitor who complained against and informed on Kay, and who has been named by the Bureau as a potential witness against Kay. He is also another example of blatantly disparate treatment between Sobel and Kay's enemies. The Bureau in this proceeding charges that Sobel transferred control of his 800 MHz stations to Kay without prior authority, and that he attempted to conceal this fact from the Commission. The Bureau has been presented with evidence, much more compelling than any offered against Sobel, that Killian lacked candor and misrepresented to the Commission to conceal his role as a real party in interest in an application submitted by his wife, with the purpose of obtaining more channels than he would have otherwise been entitled to. The Bureau continues to ignore this as it uses Killian as a witness against Kay.

45. A review of Commission records will show that Chris Killian, in 1993, made application in the name of Carrier Communications, requesting authorization for the frequencies 851.2375 and 854.1625 MHz at Mount Adalaide, near Bakersfield (Kern County) California. It appears that the application was originally filed in late 1992 or January of 1993, was returned by the Commission, and then resubmitted by Chris Killian in June of 1993, whereupon it was processed and granted by the Commission, resulting in the issuance to Carrier Communications the authorization bearing call sign WPCM497. We shall hereafter refer to this application as the "Carrier Communications Application" and to the resulting authorization as the "Carrier Communications License."

46. A further review of the Commission's records will show that on or about the same date that the above-described Carrier Communications application was originally filed, another application was filed in the name of Deborah Killian. This application requested authorization for the frequency 851.6125 MHz, also at Mount Adalaide, near Bakersfield (Kern County) California. The Commission processed and granted this application, resulting in the issuance to Deborah Killian the authorization bearing call sign WPCE285. We shall hereafter refer to this application as the "Deborah Killian Application" and to the resulting authorization as the "Deborah Killian License."

47. The business address for Carrier Communications is 42326 Tenth Street West, Lancaster, California, 93534, and this is the address that was used in the Carrier Communications Application. The address used in the Deborah Killian Application was 44349 Lowtree, Suite 163, Lancaster, California 93534. Upon information and belief, this address was at the time merely a mail drop. Deborah Killian is the spouse of Chris Killian. This relationship is not disclosed anywhere in either the Deborah Killian Application or in the Carrier Communications Application.

48. Upon information and belief, Carrier Communications was not, at the time of these applications, a corporation or a partnership, but rather a sole proprietorship owned by Chris Killian and/or an unincorporated business owned jointly by Chris and Deborah Killian. Nevertheless, the proper procedure was not followed in filling out the FCC Form 574 used for the Carrier Communications application, in that the applicant name was given as "Carrier Communications" rather than as "Chris Killian, DBA Carrier Communications." *See* FCC FORM 574 INSTRUCTIONS, Item 21, page 22 (August 1989).

49. Deborah Killian testified, under oath, at a deposition in which she was questioned regarding the Deborah Killian License. (A copy of the transcript is included as part of Exhibit CK-1.) The pertinent parts of here testimony are as follows:

- Q: Do you hold any FCC licenses?
A: I believe I hold one.
Q: What do you use that one for?
A: I don't know, I just have my name on the license.
Q: Is that something you did for your husband's business?
A: Yes.

Killian Deposition Transcript at p. 11.

- Q: So far as you know, the only place your name appears with regard to Carrier Communications is on the one FCC license?
A: That's correct.
Q: Carrier Communications uses that license in the business, is that correct?
A: I don't know.

Killian Deposition Transcript at p. 21

- Q: So you have never read ... any of the FCC rules, you don't keep around the FCC rule book or anything like that?
A: No, I don't.

Killian Deposition Transcript at p. 23

- Q: Let's see now. The radio station that we have discussed earlier that is in your name, do you know if anybody manages that particular station?
A: I know nothing about that.
Q: You don't know who it is that manages it; correct?
A: That's correct.
Q: You don't know whether or not it is pursuant to a written contract or oral contract; is that correct?
A: That's correct.
Q: You don't even know where the contract is, correct?
A: That's correct.
Q: You don't even know whether or not a contract at all exists; is that correct?
A: That's correct.
Q: Who would know these things?
A: I would imagine my husband, Chris.
Q: If somebody was in possession of any contracts about that particular station and knew where the documents would be, it would be Chris?
A: Chris.

Q: I would imagine from what you know that with regard to that particular station, you don't know whether it has been constructed, when it has been operated, or any of the details of it?

A: I know no details about it, no.

Q: You don't know whether it has been constructed?

A: I don't know.

Q: You don't know whether or not it is operating; is that correct?

A: That's correct.

Killian Deposition Transcript at pp. 26-27.

50. It is clear from the foregoing that Chris Killian has intentionally misrepresented material facts to the Commission, intentionally concealed material facts from the Commission, and otherwise lacked candor with the Commission. He obtained the Carrier Communications License by means of this fraudulent conduct. Upon information and belief, Chris Killian d/b/a Carrier Communications would not have been eligible for the two channels requested at Mount Adelaide in the Carrier Communications Application if it had, at the same time, held an authorization for or been an applicant for the third channel requested at Mount Adelaide in the Deborah Killian Application. Accordingly, Chris Killian had the Deborah Killian Application prepared in his wife's name and used an address other than his normal business mailing address. He departed from accepted procedures in giving the applicant name in the Carrier Communications Application so as to make it less likely that the two applications would be connected. Finally, he failed to disclose that he was the real party in interest in the Deborah Killian Application.

51. As a result of this fraud on the Commission Chris Killian obtained the Carrier Communications License, a valuable asset which he subsequently sold to Nextel Communications for a substantial sum of money. Included as part of Exhibit CK-1 is a copy of the application (FCC Form 490) for Commission consent to the assignment of the Carrier Communications License from "Carrier Communications and Electronics" to Smart SMR of

California, a wholly-owned subsidiary of Nextel Communications, Inc. Sobel does not know the price paid by Nextel, but based on his knowledge of the industry, he estimates that Chris and/or Deborah Killian received, or have contracted to receive, between \$50,000 and \$100,000 for the Carrier Communications License, and quite possibly more. Insofar as the authorization was obtained by means of misrepresentation and lack of candor which the Bureau refuses to sanction, and insofar as the Killian matter is but one in a host of examples of the Bureau pulling regulatory punches in favor of informants and witnesses against Kay, it is not too far fetched to characterize the Bureau's conduct as payment to Killian for testifying against Kay. Sobel, by contrast, is being made to pay a price for his association with Kay.

52. The foregoing information was presented to the Bureau more than four months ago, *see* Exhibit CK-1, but the Bureau has taken no corrective action. Notwithstanding the clear evidence that Killian misrepresented, lacked candor, and concealed the fact that he was the real party in interest in the Deborah Killian Application, the Bureau remains content to ignore the matter, leave his unjust enrichment received from Nextel intact, and to use him as a witness against Kay. This special treatment can not be squared with the Bureau's actions toward Sobel.

IV. BUREAU MISCONDUCT IN THE KAY PROCEEDING

53. An examination of the Bureau's conduct in WT Docket No. 94-147 removes any doubt that the Bureau bears an improper animus toward Kay that could well provoke retaliatory tactics against Kay's friends and favoritism toward Kay's enemies. It will be shown that some members of the Bureau staff (a) had already prejudged Kay and became determined to seek revocation of Kay's licenses before even advising him he was under investigation, (b) engaged in improper *ex parte* communications and disseminated inside information in contested proceedings so as to damage Kay, and otherwise improperly interfered with Kay's legitimate business

activities, (c) designated issues against Kay without any supporting evidence in the hope of using discovery as a fishing expedition, (d) accepted unquestioningly, relied upon, and used unsupported allegations against Kay from sources known to be biased against Kay, without making even minimal efforts to verify or corroborate the charges, and (e) coached witnesses against Kay, even to the point of soliciting false sworn statements against Kay. There can be little doubt that if Bureau staff would engage in such tactics against Kay, they are not above also improperly discriminating against Sobel, one of Kay's closest friends and business associates.

A. The Bureau's Prejudgment of Kay

54. Alleged complaints to the FCC regarding James A. Kay, Jr. were the ostensible basis for the Bureau's initiation of an investigation of Kay. The Bureau's January 31, 1994, Section 308(b) request to Kay began: "The Commission *has received complaints* questioning the construction and operational status of a number of your licensed facilities. ... In addition, the Commission *has also received complaints* questioning the actual loading and use of your facilities. The *complaints allege* that the licensed loading . . . does not realistically represent the actual loading . . . , thereby resulting in the warehousing of spectrum." Exhibit JAK-1 (underlined emphasis in original; italicized emphasis added). The alleged complaints were submitted on an *ex parte* basis by parties whom the Bureau knew to be biased against Kay.⁹

55. Even after the Bureau had ostensibly investigated Kay, it recommended to the Commission a hearing designation order seeking license revocation that was still based almost

⁹ The identities of complainants were disclosed in the *Wireless Telecommunications Bureau's Response to Kay's First Set of Interrogatories* submitted on March 8, 1995 in WT Docket No. 94-147. Most of the complaints were from competitors of Kay who would obviously be biased against him. A handful of "interference complaints" were not from users of the competitors' systems, but these, on their face, describe nothing more than the co-channel congestion typical of shared-frequency Part 90 systems.

exclusively on unverified complaints from biased sources. The *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture*, instituting the Kay license revocation was based in significant part on "complaints from other licensees," 10 FCC Rcd 2062 at ¶ 1 (1994). The Commission characterized these as "a number of *complaints* regarding the construction and operation of a number of Kay's licensed facilities," as "*reports* that Kay may not have constructed, or may have deconstructed a number of stations," and as "*complaints from competitors* alleging that Kay is falsely reporting [loading]." 10 FCC Rcd 2062 at ¶ 2 (emphasis added). Indeed, the Bureau admitted that it lacked supporting evidence for any of the issues other than the charge that Kay violated Section 308(b).

56. In the second paragraph of the letter the Bureau acknowledged that these mere allegations were the basis for the Section 308(b) request: "*Based on these allegations*, we need more information to determine whether you are qualified to be a Commission licensee." *Id.* (emphasis added). The letter ends with the admonition: "Your attention is directed to Title 18 of U.S.C. Section 1001, in which Congress has determined that a wilful false reply to a letter of this type may result in fine or imprisonment." *Id.* Having not previously communicated any complaint or concern to Kay, then, the Bureau in its initial letter to him advised him that, based solely on unproven allegations (and, indeed, allegations that were unsubstantiated, unverified, and which came from known biased sources) the Bureau was already placing in issue Kay's basic qualifications. The Bureau, in its first communications to him, and without even awaiting any sort of response, felt it necessary to threaten him with criminal prosecution should he lie. This was not the tone of an impartial investigator, but rather that of a hanging judge who had already decided the guilt of the accused. The Section 308(b) letter was an after-the-fact formality.

57. Exhibit JAK-2 is a copy of a representative Section 308(b) letter, typical of many Kay had seen over the years. It is cordial in tone. It does not challenge the licensee's qualification, nor does it threaten the licensee with criminal sanctions. Exhibit JAK-3 is a follow-up sent when the licensee failed to respond to the first Section 308(b) letter. Again, this is typical of many Kay had seen over the years. It also takes a cordial tone and does not result to judgmental language or ominous threats. When this is compared to the Section 308(b) request sent to Kay, it is clear that the Bureau had already prejudged the matter before sending the letter.

B. The Bureau's Improper Efforts to Interfere With Kay's Business

(1) Improper Use of Section 308(b) Request

58. As noted above, the Section 308(b) request the Bureau sent to Kay was suspect on its face and is itself evidence that the Bureau had already prejudged Kay. It was also improperly used by the Bureau as a weapon against Kay.

59. The scope of the Section 308(b) request was extremely broad and requested highly sensitive proprietary information, including Kay's entire customer list. Kay was concerned that if he provided this information to the Bureau, it would find its way into the hands of his competitors. Even if the Bureau did not release the information directly to the competitors, which, based on other actions of the Bureau described below, was a reasonable possibility, if not a likelihood, the competitors might obtain the information pursuant to FOIA requests. Nonetheless, the Bureau repeatedly refused Kay's requests for assurances that any information provided would be kept confidential. Frustrated, Kay began placing copyright notices on his submissions to the Bureau. This prompted the Bureau to demand 50 copies of the information that Kay was to provide in response to the Section 308(b) request.

60. The Bureau's refusal to give Kay assurances of confidentiality, coupled with the request for 50 copies of competitively sensitive information, convinced Kay that the Bureau intended to reveal the information to his competitors. This was not unjustified paranoia on Kay's part; rather, it was a reasonable apprehension confirmed by other actions of the Bureau. Shortly after the Kay received the Section 308(b) request, he learned that several of his competitors and customers were already aware of it. He later learned that the Bureau had improperly and secretly distributed the Section 308(b) request to several of Kay's competitors, customers, and potential customers. This definitely had the effect of damaging Kay's reputation and hurting his business, and this may well have been the Bureau's intention.

61. Although signed by W. Riley Hollingsworth ("Hollingsworth"), a former Assistant Wireless Telecommunications Bureau Chief (Gettysburg), the Section 308(b) request was actually written by Ms. Anne Marie Wypijewski ("Wypijewski"), a Bureau staff attorney stationed in Gettysburg who worked closely with Hollingsworth. Exhibit JAK-4 are copies of transmittal letters whereby, on January 31, 1994, Wypijewski sent copies of Kay's Section 308(b) request to Cornelia Dray, Gary Van Diest, Dr. Michael Steppe, Mr. Edward Cooper, Harold Pick, and Christopher C. Killian. Each of these persons was a competitor, customer, potential customer, and/or co-channel licensee with Kay. As noted above, one or more of them immediately began spreading false accusations about Kay around the Los Angeles mobile radio community, using the FCC letter conveniently supplied by Wypijewski. This also, of course, placed these individuals on notice of the specific information that was being requested of Kay. All they had to do was sit back and wait until the information was filed, and then request it under FOIA. Any fair minded observer must ask why it was more important to the Bureau that Kay's

enemies be kept apprised of each step of the investigation against Kay than it was for the Bureau to seek corroboration of the claims of biased accusers before rushing to judgment against Kay.

(2) The Thompson Tree Incident

62. Wypijewski's efforts to harm Kay did not stop with merely sending blind copies of the 308(b) letter to Kay's enemies. She went so far as to engage in *ex parte* communications with a party to a contested proceeding involving Kay, providing the other party with valuable strategic inside information. Kay learned about this immediately after it happened, confirming once and for all his suspicion of bad faith on the part of the Bureau, and vindicating his determination that it would have been competitive suicide to turn over his business information to the Bureau.

63. Ralph Thompson d/b/a Thompson Tree Service once held an authorization for Business Radio Service Station WIH275, authorizing operations on the frequency pair 508/511.1875 MHz at Sierra Peak in Corona (Riverside County) California. On or about January 31, 1994, Kay submitted a finder's preference request pursuant to Section 90.173(k) of the Commission's Rules, demonstrating that Thompson had discontinued operation of the station for more than one year, thereby resulting in the automatic cancellation of the license pursuant to Section 90.157(a) of the Rules. The matter was assigned Compliance File No. 93L778.

64. On December 23, 1993, Hollingsworth sent a letter to Thompson, serving him with the finder's preference request and directing him to respond within 20 days. Exhibit TT-1 is a copy of that letter. Thompson did not respond, and on March 29, 1994, Wypijewski wrote a second letter to Thompson, again requesting a response within 20 days. A copy of that letter is attached hereto as Exhibit TT-2. Wypijewski did not serve a copy of the letter on Kay. This is significant in that Kay's finder's preference request should have been granted at that point. Kay

had presented compelling evidence of abandonment by Thompson, and after nearly three months, Thompson had failed to respond to the Commission's request. Instead, Wypijewski, on an *ex parte* basis, wrote to Thompson giving him a second chance to respond. Allowing Thompson additional time to respond was within the scope of the Bureau's discretion, but initiating *ex parte* communications with a party to a contested matter is not. In fact, it is unlawful conduct, proscribed by Commission regulation.

65. On April 5, 1994, Thompson responded to the Wypijewski letter and served a copy of his response on Kay. On April 8, 1994, Kay initiated discussions with Thompson leading to an agreement whereby Kay would provide repeater service to Thompson and Thompson would voluntarily surrender his license for cancellation. On April 15, 1994, Thompson executed a formal repeater agreement with Kay and signed an FCC Form 405-A, surrendering his license call sign WIH275 for cancellation.

66. On or about April 18, 1994,¹⁰ Wypijewski telephoned Gail Thompson, Ralph Thompson's wife. Exhibit TT-3 is the sworn affidavit of Mrs. Thompson recounting that conversation. Wypijewski provided Mrs. Thompson with strategic inside information regarding the anticipated FCC disposition of matter. She effectively "coached" Thompson on how her husband could regain the authorization, knowing full well that the disposition of the authorization was a pending contested matter. Wypijewski advised Mrs. Thompson that the authorization was going to be canceled regardless of the finder's preference request, but she explained that the channel would then be "up for grabs" and that anyone, including Mr. Thompson, could file an application for it.

¹⁰ Although Mrs. Thompson's affidavit does not specify the date of this telephone call, Kay has placed it at April 18, 1994, because Mrs. Thompson called Kay immediately afterwards and advised him of her conversation with Wypijewski.

67. On April 22, 1994, call sign WIH275 was deleted from the Commission's database. On April 25, 1994, Wypijewski mailed a letter to Kay dismissing his finder's preference request on the grounds that the Commission was already investigating the matter prior to receipt of Kay's finder's preference request.¹¹ Kay received his service copy of this letter on April 28, 1994. On April 29, 1994, Wypijewski again telephoned Mrs. Thompson, but did not reach her and only left a message. Mrs. Thompson did not return the call, but it is obvious from the context that the purpose of Wypijewski's April 29 call was to alert Mrs. Thompson that both the cancellation and the finder's preference request had been dismissed, and that the time was ripe for Mr. Thompson to re-file an application. With this kind of inside information, Thompson might well have been able to file an application and obtain an authorization before the general public even became aware of the opportunity. Thus, by means of illegal *ex parte* communications, Wypijewski attempted to give Thompson what, as a practical matter, was the finder's preference she had just denied Kay.

68. By engaging in communications with and providing inside information to Mrs. Thompson, Wypijewski not only violated the spirit and the letter of the Commission's *ex parte* rules, she also attempted, perhaps intentionally, to interfere with Kay's contractual relationship with Thompson. Wypijewski's conduct is unbecoming of an ostensible public servant, and is inexcusable.

¹¹ Ironically, this was because of a prior letter from Kay, sent on September 20, 1993, requesting removal of the Thompson license from the database because of discontinuance.

(3) The Pro Roofing Incident

69. Hollingsworth, or persons acting under his direction, apparently interfered with a legitimate attempt by Kay to press criminal charges against the perpetrator of a theft of service against Kay's repeater company.

70. On December 14, 1995, Kay discovered that a company called Pro Roofing was operating mobile units that had been programmed, without Kay's knowledge or consent, to operate on Kay's conventional SMRS Station WNYR747. When Kay investigated further he learned that Harold Pick d/b/a Century Communications had programmed approximately seven or eight units for Pro Roofing to operate on Kay's repeater. Exhibit PR-1 is a copy of December 14, 1995, letter from Kay to the FCC field office in Cerritos, California, asking them to investigate the matter. The Commission apparently took no action in response to Kay's letter, and the only acknowledgment came eight month's later Kay received a fax message (Exhibit PR-2) from James LaFontaine, then a Commission employee stationed at the Cerritos field office, simply asking Kay if "this problem [is] still occurring." Exhibit PR-2 at p. 1.

71. Further details regarding this matter are set forth in Exhibit PR-3 (the sworn declaration of Marc Sobel) and Exhibit PR-4 (a private investigation report prepared for Kay). It is conclusively shown that Harold Pick was responsible for the intentional programming of the Pro Roofing radios for unauthorized access to Kay's repeater. Exhibit PR-5 contains documents further corroborating this. An invoice from Century Communications Services, Pick's company, indicates that Pick had visited Pro Roofing on November 17, 1995, to install radios. Exhibit PR-5 at p. 1. A copy of Harold Pick's business card was obtained from Marvin Han, General Manager of Pro Roofing. *Id.* at p. 2. Pick thus programmed the radios of his customer, Pro Roofing, to operate on Kay's repeater. In essence, he was selling air time on Kay's repeater without Kay's

knowledge or consent, and keeping the proceeds. This is (or should have been) an open-and-shut case of theft of service. The law enforcement authorities refused to pursue the matter, and it appears that communications from FCC personnel in Gettysburg, Pennsylvania may have been responsible for this.

72. Exhibit PR-6 is a copy of the police report in this matter. It will be noted that Pick told the investigating officer he was "getting assistance from the FCC" regarding this matter. Exhibit PR-6 at 3. The report further discloses that the investigating officer called the FCC in Gettysburg and was that "the FCC is aware of the problem and they are investigating." *Id.* But that is not all the Gettysburg staff said to the Los Angeles police regarding this matter. Exhibit PR-7 is a copy of a private investigation report prepared for Kay. It indicates that Detective Martinez of the L.A.P.D. Wilshire Division, contacted the FCC in Gettysburg and, in addition to being advised that Kay was under FCC investigation, was "provided ... with certain confidential information." While both the police report and the private investigation report say that the contact person at the FCC was Sharon Bowers, Chief of the Wireless Telecommunications Bureau's Informal Complaints & Public Inquiry Branch, it is extremely unlikely that she would have released confidential information regarding the investigation of James Kay without the knowledge and approval, if not the directive, of Hollingsworth who was at the time actively involved in the prosecution of the Kay revocation hearing.

73. The investigating officer advised Joel S. Wyenn, the private investigator pursuing the matter on Kay's behalf, that the case was not being pursued because they felt it was more properly a civil matter. But this is curious. Consider what Pick did in selling repeater airtime to a customer he surreptitiously placed on Kay's repeater. To understand this, translate it into the equivalent scam on a cellular system. One holds himself out as a reseller of cellular service, but

actually provides customers with illegally cloned phones. In this case the "reseller" is selling stolen airtime. It is simply not credible to believe that law enforcement officials would not pursue a criminal prosecution of such a scheme. Yet that is precisely what Pick was doing, and they dismissed it as a "civil" matter. This excuse is further contradicted by the fact that such practices in fact are criminally prosecuted in Los Angeles. *See, e.g.*, Criminal Case No. 91W08328, West Los Angeles, in which one Richard Chaidez was charged with theft of "the personal property of another ... to wit, RADIO FREQUENCY." In a subsequent criminal proceeding Mr. Chaidez was charged with "willfully and unlawfully take ... REPEATER USAGE FEE ... the property of KHM Communications."

74. It is thus clear that Los Angeles law enforcement officials in fact do not consider theft of a licensee's airtime to be a purely civil matter; rather, it is criminally prosecuted. The evidence that Pick engaged in theft of service from Kay is extremely compelling, but the police and/or prosecutors are not pursuing the matter. It appears very likely that their inaction on this matter is somehow related to or caused by the "confidential information" provided to Detective Martinez. Hollingsworth certainly has knowledge of what information was provided, and he may have even directed the disclosure. Kay was the victim of a criminal act by Pick. Regardless of what Hollingsworth or any other Bureau staff member may think of Kay or may try to prove about Kay in an enforcement proceeding, it is entirely inappropriate for the Bureau to interfere with Kay's efforts to seek redress for criminal acts committed against him.

C. Use of Designation and Discovery as a Weapon Against Kay

75. Hollingsworth was determined to revoke Kay's licenses regardless of whether he had any evidence of wrongdoing by Kay. Exhibit JAK-5 is a September 15, 1994 memorandum from Hollingsworth to the Chief of the then Private Radio Bureau, proposing that license revocation proceedings be initiated against Kay. The primary justification offered by Hollingsworth was Kay's failure to provide information requested in the Section 308(b) request. Hollingsworth conveniently neglected to disclose, however, that Kay had good reason to defy the Section 308(b) request. Hollingsworth's memo did not include the crucial facts that the Bureau (a) was improperly releasing information about Kay to Kay's competitors, (b) was engaging in unlawful *ex parte* communications with and providing assistance to Kay's opponents in contested proceedings, and (c) had asked Kay to turn over his entire customer list.

76. Not content with having forced Kay into a corner with the Section 308(b) request and then using it as a weapon against Kay, Hollingsworth further included in the draft designation order charges that Kay had violated other FCC regulations and policies, even though there was no basis for such issues. It is clear that the only information Hollingsworth had of these other allegations were the bare and self-serving accusations of biased parties. Hollingsworth should have sought support or corroboration from Kay's accusers; he should have carefully investigated their assertions. Instead, he accepted them at face value, brought designation proceedings against Kay without proper investigation, and then sought to improperly exploit the discovery procedures to build his case against Kay after the fact. Hollingsworth admits as much in the memorandum when he advised the Bureau chief that "[w]e have confidence that discovery will reveal" such violations, or "[w]e include ... miscellaneous allegations ... based on various reports received" Exhibit JAK-5 at p.2.

D. The Bureau's Failure to Verify Accusations of Biased Informants

77. It is bad enough that Hollingsworth initiated enforcement proceedings and sought to impose severe sanctions on Kay without adequate supporting evidence. What is far worse is the length to which Hollingsworth was willing to go in attempting to buttress his nonexistent case after the fact. In this section it will be shown that Hollingsworth, in his pursuit of Kay, solicited from potential witnesses against Kay sworn statements containing assertions that Hollingsworth knew or should have known were false.

78. During October of 1994 Hollingsworth traveled to California where he conducted one or more interviews with Harold R. Pick ("Pick"), an FCC Part 90 licensee and a competitor of Kay. Hollingsworth thereafter prepared a written statement based on such interview(s). Exhibit HP-4 is a copy of a January 10, 1995, from Hollingsworth transmitting to Pick "a statement based on our interview with you in October concerning the James Kay matter." Exhibit HP-5 is a copy of the statement as modified and executed by Pick on January 19, 1995. The statement was offered by Pick "under oath in connection with an official proceeding before the Federal Communications Commission." Exhibit HP-5 at p. 1. It is clear from the content of the statement and Hollingsworth's transmittal letter that the proceeding referred to is WT Docket No. 94-147, *i.e.*, the license revocation proceedings against James Kay.

79. The Pick statement contains the following passage:

Sometime soon after that three of my repeaters were stolen off of Saddle Peak. I put word out to as many people as I could that my repeaters had been stolen, and Dan Magro, of Portable Clinic, a radio shop, called me and said he had bought 3 repeaters very cheaply and they appeared to be mine. I got my repeaters back and reimbursed Magro.

HP-2 at p. 3.¹² The above-quoted passage appears to have been part of the original statement as drafted by Hollingsworth. It appears Pick changed only one word in the original draft of the above-quoted passage.¹³ Thus, Hollingsworth drafted the passage and asked Pick to swear to it.

80. The obvious intention of the passage is to imply that the repeaters were stolen by Kay. There is no other reasonable explanation why the incident should be reported in the middle of a statement prepared specifically for the Kay revocation proceeding--a statement containing numerous other assertions and allegations of misconduct by Kay. The quoted passage, in the context in which it was offered,¹⁴ is nothing short of an assertion that Kay committed the felonious act of stealing Pick's repeaters from Saddle Peak. But Pick knew and Hollingsworth should have known that Kay had nothing to do with the theft.

81. Exhibit HP-6 is a copy of a July 29, 1991 letter from Pick to Terry Fishel, a subordinate of Hollingsworth in the FCC's Gettysburg office. It is clear from this letter that the theft in question occurred on or about July 27, 1991 and that Pick initially suspected Will Martin (of Montebello, CA) and/or Van Williams (of Santa Monica, CA). A few months later Pick learned that the perpetrator was actually one James Allen Beck (of Santa Monica, CA). Beck was

¹² In the paragraph immediately preceding the quoted passage, it is alleged that Kay made a threatening telephone call to Pick's mother in 1992. The quoted passage then begins with the phrase, "Sometime soon after that ...". This is either a clerical error or Pick is confused as to the dates insofar as the documentary evidence discussed more fully herein establishes that the theft to which Pick refers occurred in June of 1991.

¹³ An examination of the statement reveals that changes or edits were made either by hand or by typewriter. Even when made by typewriter, however, the modifications are obvious. The only apparent change from the original draft in the quoted passage is in the second sentence where the word "he" has been typed through and the word "I" has been inserted in its place.

¹⁴ The entire statement is replete with allegations and accusations against Kay. The paragraph immediately preceding the quoted passage includes allegations that one of Kay's customers threatened Pick and that Kay made a threatening telephone call to Pick's mother. Immediately following the quoted passage is an assertion that Kay intimidated a Pick customer. The inclusion of the quoted passage at all and certainly its juxtaposition were clearly intended to convey that Kay stole the repeaters.

charged in connection with the theft and thereafter made a plea arrangement with prosecutors. Exhibit HP-7 is a copy of the transcript of the September 21, 1991 plea hearing in Criminal Case No. SA007943 in Santa Monica Municipal Court. Beck entered a guilty plea to, *inter alia*, a felony charge of receiving stolen property. A condition of the plea arrangement was that Beck make restitution to Pick. Because of his status as a victim in the criminal case, Pick received a "Notice of Sentencing Hearing," advising him of Beck's conviction and notifying him of the sentencing hearing scheduled for October 17, 1991. *See* Exhibit HP-8.¹⁵

82. As early as October of 1991, and at all times since, Pick has known that the theft of the repeaters from Saddle Peak was perpetrated by James Allen Beck, not by Kay. Even before learning that Beck was the thief, Pick suspected persons other than James Kay, namely, Messrs. Martin and/or Williams. Nevertheless, in October of 1994 Pick made statements to Hollingsworth suggesting that James Kay stole the repeaters. In January of 1995 Pick executed a sworn statement, under penalty of perjury, containing statements intended to implicate James Kay in the theft. Pick thus knowingly made false statements to a government agent in connection with an official investigation, and he later committed perjury by knowingly repeating the statements in writing and under oath. At a minimum Pick's conduct constitutes misrepresentation to and lack of candor with the Commission.

83. Hollingsworth relied upon the false statements of Harold Pick in building a case against James Kay. Hollingsworth later prepared a written statement, to be sworn to under oath by Pick, in which he included those same false statements. Hollingsworth's reliance on Pick's assertions and his inclusion of Pick's false implications in the written statement were, at best,

¹⁵ The notice appears to have a clerical error in that the case number is given as SA007743 rather than SA007943.

inexcusably negligent. If Hollingsworth had been seeking the truth, rather than merely accepting without question any and all "dirt" he could find on James Kay, he would have had every reason to be skeptical of Pick's assertions. Hollingsworth knew that Pick and Kay were fierce competitors. There was much regulatory litigation between the two pending before Hollingsworth's office. Hollingsworth thus knew that Pick was a biased witness with a strong incentive to falsely accuse Kay. Further, Pick had previously informed Hollingsworth's Gettysburg office in writing that he suspected persons other than Kay of the theft, *see* Exhibit HP-6, rendering his later gratuitous implication of Kay suspect on its face. Pick was not an informant whose statements Hollingsworth should have accepted at face value. In point of fact, when Hollingsworth prepared the statement for Pick to sign, he was already on notice that Pick had submitted a false sworn declaration to the Commission supported by falsified documents. *See* Section III.A(2), above, ¶¶ 32-37.

84. Any competent and open-minded investigator would have questioned and further tested the veracity of the theft allegation before incorporating it into a sworn statement. One might expect even a biased investigator to have at least sought corroboration. With only minimal checking Hollingsworth would have discovered Pick's letter in his own files, and he would also have discovered the police file and the public record of the criminal proceeding that brought James Allen Beck to justice for the offense that Pick was attempting to lay at Kay's feet. But Hollingsworth, assuming *arguendo* he is competent, is certainly not open-minded when it comes to Kay. His litmus test for evidence is not whether it has any basis in fact, but rather whether it paints Kay in a bad light. If it satisfies that threshold, Hollingsworth gives no further consideration to whether the information is reliable; he simply proceeds to use it in an attempt to destroy Kay.

E. Coaching and Soliciting False Statements from Potential Witnesses

85. Hollingsworth met with Mr. Richard L. Lewis ("Lewis") at the FCC field office in Cerritos, California, in late 1994, probably in December, but possibly in October.¹⁶ Lewis had been Transportation Manager for the Fullerton (California) Elementary School District for ten years from April of 1983 to April of 1993. Following this meeting Hollingsworth¹⁷ prepared a written sworn statement for Lewis. Exhibit RL-1 is a copy of the statement as reviewed and executed by Lewis on February 16, 1995. The statement was offered "under oath in connection with an official proceeding before the Federal Communications Commission,"¹⁸ Exhibit RL-1 at p. 1. Hollingsworth had Lewis "swear under penalty of perjury before a duly licensed notary public that th[e] statement was true and accurate to the best of [his] knowledge and belief." *Id.* t p. 3.

86. Less than a month after the statement was executed, the Bureau formally identified Lewis as one believed "to have knowledge of instances of deliberate and/or malicious interference" by Kay, *Wireless Telecommunications Bureau's Response to Kay's First Set of Interrogatories* (served on March 8, 1995 in WT Docket No. 94-147) at p. 16, Response 4-1, and "to have direct knowledge of relevant facts relating to instances of abuse of process" by Kay. *Id.* at p. 19, Response 5-1. When that is considered in light of the content of the statement, it is apparent that the Bureau intended to rely on testimony of Lewis against Kay. Hollingsworth

¹⁶ Lewis believes the meeting took place in late January or early February 1995. On information and belief, however, Hollingsworth made two trips to California relating to the Kay investigation and/or hearing, one in October of 1994 and the other in December of 1994. It is therefore most likely that Hollingsworth's meeting with Lewis occurred during the December visit.

¹⁷ On information and belief, Hollingsworth prepared the statement, although it may have been prepared by Anne Marie Wypijewski (of the Bureau's Gettysburg office) or one or more other Bureau staff members under Hollingsworth's direction and supervision.

suggests through the Lewis statement that: (a) a typical conflict between validly licensed users operating on a shared channel was "deliberate and/or malicious interference" for which Kay was somehow responsible, (b) Kay improperly and without authority or consent converted the School District's license from a "GP" to a GB"; and (c) Kay improperly and without authority or consent converted the School District's license from a community repeater (FB4) to an SMR end user authorization.

87. As explained in detail below: (a) Lewis had no complaint with Kay and did not initiate communications with the Bureau about Kay; (b) Lewis was not aware of and did not have independent belief of the charges against Kay prior to being "coached" by the Bureau; (c) even now Lewis does not even understand the ostensible significance or consequences to the School Board of the actions attributed to Kay; (d) the allegations in the statement of improper conduct by Kay were not matters known to Lewis but rather information that was provided to him by the Bureau; and (e) Hollingsworth knew or should have known that the information he fed to Lewis and asked Lewis to recite under oath was false and inaccurate.

88. Exhibit RL-2 is the transcript of the November 7, 1996, deposition of Lewis.¹⁹ Lewis's deposition testimony was given under oath, on the record, and with legal counsel for the School Board present.²⁰ It reflects follow-up questioning by both counsel for Kay and counsel

¹⁸ It is clear from the content of the statement that the proceeding referred to is WT Docket No. 94-147, *i.e.*, the license revocation proceedings against James Kay.

¹⁹ The deposition was taken in state civil litigation, *James A. Kay, Jr. v. Edward Alan Cooper*, Orange County (California) Superior Court, Case No. 763-538. The attached copy is a "Min-U-Script"® version in which several pages of the original transcript are condensed to fit, in unabridged form, to fit on a single sheet. For purposes of greater precision, therefore, the citation references used herein are to the original transcript page numbers, not the actual Exhibit RL-3 page numbers.

²⁰ Lewis was not represented by counsel at the Cerritos meeting with Hollingsworth. Exhibit RL-3, Transcript at p. 61.

for the School District to get in-depth clarification of the matters discussed. The transcript therefore represents a much more reliable and detailed account of Lewis's knowledge, understanding, and belief than does the witness statement written for him by Hollingsworth on a purely *ex parte* basis. In every significant respect, Lewis's deposition testimony contradicts the allegations set forth in the statement, and is at complete odds with the impression given by the Hollingsworth-prepared statement and with the Bureau's subsequent under oath²¹ representations of Lewis's knowledge.

89. Lewis was questioned about the facts and circumstances surrounding the preparation of his written statement to the FCC and the matters recounted in it. The statement is the product of a meeting between Lewis, Hollingsworth, and one other gentleman from the FCC whose name Lewis can not remember. Lewis testified as follows:

Q. I would like to ask you a question about the language and wording of this particular [statement]. Is this something that you did exclusively on your own and wrote out, or did someone else help you write it? What were those reasons?

A. This was -- I -- it was done through conversation with the FCC.

Q. Can you recall approximately how many people at the FCC you talked to?

A. I believe two.

Q. One was Mr. Hollingsworth?

A. Yes.

Q. And the other was?

²¹ In the *WTB Interrogatory Responses* the Bureau asserted that Lewis had "knowledge of instances of deliberate and/or malicious interference" by Kay and "direct knowledge of relevant facts relating to instances of abuse of process" by Kay, Hollingsworth and by William H. Kellett, an FCC staff attorney under Hollingsworth's supervision, both "declare[d] under penalty of perjury that the [*WTB Interrogatory Responses*] are true and correct to the best of our information, knowledge, and belief." Exhibit RL-2. Because Lewis has no such knowledge, this certification is false.

A. I have no recollection of the name.

* * *

Q. ... Did they write this out for you or type it out for you?

A. They typed it out and sent it to me at a later date. I reviewed it and then mailed it back to them with my corrections.

Exhibit RL-2, Transcript at 48.

90. FCC personnel initiated the contact with Lewis. After a couple telephone conversations, Lewis was asked to meet with Hollingsworth in Cerritos, something he did strictly at the request of the FCC. *Id.* at 59-60. The statement, as written, gives the overall impression of being a sort of complaint made by Lewis to the FCC regarding Kay's actions. But Lewis testified that that he does not recall talking to anyone at the FCC regarding this matter prior to the Bureau-initiated contact in 1994, a time *after* he left the School District and was no longer responsible for its communications system. *Id.* at 30. Prior to his departure from the School District in April of 1993, Lewis never discussed the matter with Mr. Edward Alan Cooper, his successor, nor did he direct Cooper to make any complaints or reports to the FCC regarding the matter. *Id.* at 58-59.

91. The Lewis statement relates that the School District began experiencing a problem with its radios in January of 1992. A company identified in the statement as Hyster²² was frequently heard on the channel. Motorola, with whom the School District had its repeater service, appeared unable to solve the problem. When Mr. Don Kirk of Newport Radio called on Lewis to sell him some radios, Lewis asked Kirk to look into the problem. Exhibit RL-1 at 1. Kirk investigated and reported back that Hyster appeared to be validly operating on a repeater

²² The company in question is Hyster Lift, a forklift company.

licensed on the same channel more than 70 miles away, but was overriding the signal of the Motorola repeater the School District was on because it was operating at higher power. *Id.* at 1-2. Lewis was unsuccessful in getting Motorola to solve the problem, so he asked Kirk for further assistance. Kirk then enlisted Kay's assistance. *Id.* at 2. The solution eventually worked out between Lewis, Kirk, and Kay was to have the School District's service transferred from the Motorola community repeater to an SMR station to be owned and operated by Kay at nearby Santiago Peak. *Id.*

92. By including these facts in the Lewis statement, a declaration prepared for and in connection with the Kay license revocation proceedings, Hollingsworth is attempting to suggest that the problem the School District experienced with Hyster was deliberate and malicious interference and that Kay was somehow responsible.²³ Moreover, the statement implies that Lewis believed as much and reported this to the Commission. But these are false impressions, for Lewis testified as follows regarding the alleged interference:

Q. So you actually did hear the interference that you have discussed with us, correct?

A. Yes.

Q. Did you come to know what the reasons for it were at some point in time?

A. Yes.

Q. What were those reasons?

A. We were told by another individual that there was a -- our frequency had been within only a 75-mile radius

Q. So he didn't lead you to believe, then, that the additional users on the same channel that the school district was on were there unlawfully?

²³ The Bureau specifically identified Lewis as one with "knowledge of instances of deliberate and/or malicious interference" by Kay. *See* footnote 21, *supra*.